

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

IN THE

FILED MAR 30 1936

UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA

JANUARY TERM, 1936.

CLERK

No. 6623.

825

GEORGE BLANKS,
PLAINTIFF IN ERROR,

VS.

BOARD OF COMMISSIONERS,
DEFENDANTS IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

RAYMOND M. HUDSON,
MINOR HUDSON,
GEOFFREY CREYKE, JR.,

Attorneys for Plaintiff in Error.

IN THE
**UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA**

JANUARY TERM, 1936.

No. 6623.

GEORGE BLANKS,
PLAINTIFF IN ERROR,

vs.

BOARD OF COMMISSIONERS,
DEFENDANTS IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of Case.

This is a writ of error to a judgment of the Municipal Court dismissing an action where plaintiff in error sued for a refund of \$15.00 license tax paid for the year beginning November 1, 1932 for a rooming house at 16 Third Street, S. E., Washington, D. C. for the operation of which there is no license tax or other tax required by the act of Congress, D. C. Code, Title 20, Section 1729, being the Act of July 1, 1932, which is made applicable only to apartment houses, as the said premises consists of three stories and basement and no part of the basement has ever been used for living

purposes or rented. The three other floors were rented as follows during the said two years, 1932-3 and 1933-4:

On the first floor one room was rented to one tenant; one room to one tenant; and one room, and a kitchen were rented to one tenant, a man and wife. There was one public bath; no private bath: on cross examination plaintiff testified a young man paid the rent for the first two rooms adjoining on this floor, one for his mother and one for his aunt, but neither did cooking. (R. 8.)

On the second floor there were five rooms and each of the five rooms was rented to a separate tenant, making five tenants. There were two public baths. No private bath. In about December, 1934 the plaintiff's daughter, who was managing the house for him, took two rooms on the second floor but sometimes she rents one of those out. (R. 9.)

On the third floor there were three separate rooms of which two were rented to a man and his wife, and the other was rented to one tenant, making two tenants. There is no bath on this floor. (R. 9.)

The plaintiff furnished the light, water, gas, furniture and linen in these premises and in the other two premises mentioned hereinafter, but does not furnish meals in any of the premises. (R. 9.)

In most of the rooms, the tenant is a man or two men, or a woman or two women and in some few cases, a man and wife. The rooms are rented by the week, payable by the week. (R. 9.)

Plaintiff in error offered to prove that these premises and similar ones in Washington are listed in the diversified Classified Section of the Telephone Company's Directory as "*Rooming Houses*" and are so recognized by the general public, and apartment houses are listed under a different classification as "*Apartment Houses*" in the Classified Section of the said Telephone Company's Directory, but the Court sustained an objection and allowed an exception. (R. 9.)

Demand was made on plaintiff in error to pay the tax but he protested it and finally when the *officer* appeared and *threatened to arrest him then and there he paid it under protest* and later made the demand in writing for its return or refund to him and the defendant in error in writing refused to refund same. (R. 8.)

In 1934 the defendant in error summoned the plaintiff in error to the Corporation Counsel's office to show cause why he should not be prosecuted for not paying a tax on this property and on a similar property at 14 Third Street, S. E., and at 313 East Capital Street, and he gave the Corporation Counsel the facts stated above as to 16 Third Street, S. E., and the Corporation Counsel refused to issue a warrant; he gave the information as to 14 Third Street, S. E., and 313^{East} Capital Street, which are practically the same as 16 Third Street, S. E., but the Corporation Counsel then issued two warrants against him, one on 14 Third Street, S. E. and one also on 313 East Capital Street, which were filed in the police court and tried and Judge

Schuldt held that the statute was not applicable to "rooming houses" but only to "apartment houses" and dismissed both warrants. During the trial of this action, evidence of this trial and decision was offered which was objected to, which objection was sustained with exception. This was clearly erroneous as the police court decision is *res judicata* as between plaintiff in error and defendant in error. (R. 9-10-11.)

The evidence showed that the houses are in a congested section and that the tenants were poor people hardly able to make a living and that some were on the relief rolls. (R. 12.)

ARGUMENT.

POINT I.

The commonly accepted and known "Rooming Houses" are not included in the taxing statute (Code Title 20 Sect. 1729), taxing "Apartment Houses" being a building in which the rooms are occupied in suites by three or more families.

The only evidence in the case was that of the plaintiff in error and he testified to every material fact in the declaration and there was no contradiction of his testimony so that the question to be decided is whether or not ordinary rooming houses are included in the statute.

The defendant in error contended that if a man and his wife lived in one room, furnished by the landlord, that it is a suite, and in other rooms there would be a

man and his wife with one room and a little kitchenette and if there were three such in the house that then there were three or more families in suites and the house was within the ambit of the statute. This contention is without merit.

That Congress being familiar with the following decisions, definitions, and "Rooming House" and "Apartment House", listings in directories, did not intend the statute to cover the ordinarily accepted term of "rooming house" seems evident from section 1728, putting a license of \$18.00 on hotels and then following it with section 1729 of title 20 to the code which is as follows:

"1729. Apartment Houses—Owners or managers of apartment houses shall pay a license fee of \$15.00 per annum. Provided, That where the owner or manager maintains a restaurant on said premises the license fee shall be \$18.00 per annum, Provided further, that if a restaurant is conducted on the premises by other than the owner or manager of the apartment house, the proprietor of such restaurant shall be liable for a separate restaurant license. Within the meaning of this section an apartment house shall be a building in which the rooms are *occupied in suites by three or more families*. (July 1, 1902, 32 Stat. 622 c. 1352, sec. 7; July 1, 1932, 47 Stat. 555, c. 366, par. 29.)"

All italics in this brief are supplied.

The plaintiff in error only conducts a rooming house, and it could hardly be raised to the requirements of a tenement house, and cannot, by any stretch of imagination, be considered an apartment house.

Under latter day definitions and understandings of rooming houses, tenement houses and apartment houses, a rooming house is one where the owner supplies the furniture and bedding, and rents by the week, and does not have to take any one and everyone that comes along like a lodging house owner, who is generally considered as confined to transients, 12 C. J. 204, citing a number of English cases.

From W. & P. 175 (4th series); "An 'apartment house' is not a hotel, but is a building used as a dwelling for several families, each living separate and apart. *Pierce v. Kelner*, 156 A. 61, 62, 304, Pa. 509. There are separate baths."

Webster's New International Dictionary defines thus:

"1. An apartment is a suite or set of rooms; esp. in the United States, a *number of rooms* with necessary corridors, etc., occupied as a dwelling by a family; *often, such a suite more pretentious than a flat.*

An apartment house is a building comprising a number of suites designed for separate house-keeping tenements, but having conveniences, such as heat, light, elevator, service, etc., furnished in common; * * * often distinguished in the United States from a flat house.

A suite is a connected series or succession of objects; a number of things used or classed together; a set, as, a suite of rooms; a suite of minerals.

A series is a number of things or events standing or succeeding in order, and connected by a like relation; sequence; order; course; a succession of things; as a series of calamities or of triumphs.

A succession is an act of succeeding; a following of things in order of time or place, or a series

of things so following; sequence; as, a succession of disasters.”

Two is not a suite; two is not a series; two is not a succession.

In Cedar Rapids Investment Company vs. Commodore Hotel, 205 Iowa 736, 218 N. W. 510:

“There is a well understood difference in meaning between an ‘apartment’ and a ‘room’ in a rooming house, between an apartment house and a rooming house—a difference that is recognized by the statutes as has been seen. We shall not undertake the dangerous, even impossible task of formulating a definition of a rooming house and an apartment, or laying down a rule for technically distinguishing between the keeper of a rooming house and the proprietor of an apartment house, or the relationship between them and their respective patrons. *Generally speaking, however, the rooming house proprietor furnished bedrooms, or sleeping accommodations used principally as a place to rest, sleep, for toilet and dressing. A rooming house is usually a house where bedrooms as such are furnished.* It is not ordinarily expected that housekeeping, light or heavy, or the preparation or enjoyment of meals will take place there, or that the room will be used to any considerable extent as a sitting room.

An apartment, however, is usually looked upon as a home. It may consist of a single, main room, but its term implies that housekeeping, including necessary accumulation and preparation of food and cooking will be conducted there. It is frequently provided with *separate or common laundry facilities and usually with separate accommodations for toilet and bath.* The room in a rooming house is usually in the immediate possession (when the occupant is in there) and *dependent on the care of the proprietor.*

An apartment building, in a sense, consists of a number of dwellings or homes under the same roof: It is an *improvement of the old fashioned "flat."*

Kitching vs. Brown, 180 N. Y. 414, 73 N. E. 249, held that a covenant preventing the building of a tenement house did not prevent the building of an apartment house, and the Court said, 'turning now to the lexicographic definitions we find that the terms 'tenement houses' and 'apartment houses' are coined rather than derived. A tenement is a dwelling inhabited by a tenant; a dwelling; an abode; a habitation; a home.—Cent. Dic. & C. Y. C. An apartment is: (1) a room in a building; a division in a house separated from others by partitions; (2) a suite or set of rooms; specifically a suite of rooms assigned to the use of a particular person, party or family.—*Id.* The terms 'tenement' and 'apartment' are generally applicable to all kinds of human habits; in the one case to any place of human abode and in the other to any division of such abode. Definitions of these terms are to be found in all of the older dictionaries, such as Johnson's (1818), Craig's (1859), Worcester's (1860); but *tenement houses were not mentioned until later and definitions of apartment houses are of still more recent origin.*

The Century Dictionary defines a tenement house as a house or block of buildings divided into dwellings occupied by separate families; technically in the State of New York any house occupied by separate families; technically in the State of New York, any house occupied by more than three families. *In ordinary use the word is restricted to such dwellings for the poorer classes in crowded parts of the 'cities', the same authority defines an apartment house as a building divided into separate suites of rooms intended for residence, (but commonly without facilities for cooking and in this respect different from a flat though the two words are often used interchangeably;) also dis-*

tinguished from tenement house. Other definitions varying in amplitude, but all of similar import are to be found in the various dictionaries now extant and a single further extract from the New International Encyclopedia of 1903, and several to illustrate how little the science of lexicography has contributed to habit, difference, and perspecadious definitions of the terms under consideration, and how much we are dependent upon *popular usage and common understanding when in search for practical and concrete definitions* of such terms. The authority last cited, defines an apartment house as a building arranged in three or more suites of *connecting rooms*, each suite designed for independent housekeeping, but with certain mechanical conveniences as heat, light or elevator service furnished in common to all of the families occupying the building. Legally, there is no difference in the United States between an apartment house and any other tenement. *Popularly, the apartment house differs from the tenement in the elegance of architectural finish, in the larger number of conveniences and in the greater complexity of mechanical service furnished to all tenants from a central point. Midway in the popular usage by the tenement house on the one hand which is the home of the poor and the apartment house on the other hand, annual rentals place it beyond the means of those with moderate incomes, stands the flat, which, like the cottage of the suburbs is designed for people of moderate means.*"

Max vs. Brogan, 98 N. Y. S. 89 following *Kitching vs. Brown* and the Court stated:

"That there is a wide *difference between a tenement house and an apartment house* (and in the construction of covenants such as that involved here, such differences is *recognized by the Courts*) is well settled; *Kitching vs. Brown*, 180 N. Y. 414, 73 N. E. 243; *White vs. Collins B. & Con. Co.*, 82 App. Div. 1, 81 N. Y. Supp. 834, while there is no

actual legal definition of a tenement house, still in the year of 1889, when the covenant between these parties was made and even prior thereto, the difference between such a house and an apartment was a matter of common knowledge.”

In *Skillman vs. Smatheuret*, 57 N. J. Eq. 1, at page 5, 40 Atl. 855, at page 856, Chancellor McGill said of a flat or a flat house:

“It is really a community house designed for the accommodation of more than an individual and his household.” In that case the building consisted of three stories upon each floor of which building there were apartments equipped for house-keeping and the Court designated it as a “flat” or “flat house”.

In *Grimmer vs. Tenement House Department*, 97 Northwestern Reporter, 84, it says, under the New York Statute: “An apartment house shall be taken to mean and include every building which shall be intended or designated for, or used as, the home of three or more families or households *living independently of each other with a kitchen, set bath tub, and water closet, separate and apart from any other.*”

See *Satterthwait, et al. vs. Gibbs, et al.*, 135 Atlantic 862 (Pa.); *Apartment Hotel Owners Association vs. City of New York*, 133 Misc. Rep. 881, 233 N. Y. S. 553; *Villari vs. Duggan*, 253 N. Y. S. 83.

Gibson vs. Hoffman, et al., 143 At. 635 (Conn.) held that a building containing *single apartments* rented to separate families on each of three floors was a tenement house within Gen. St. 1918, 2564, and hence subject to provisions of chapter 133, including section

2567, requiring owner of every tenement house to provide for lighting of public halls at night.

The Court will note that the New York and other cases cited above define apartments as entirely different from tenement and rooming houses, and the definitions given by the dictionary as well as Court definitions, make the same distinction, and under those definitions, it does not seem disputed that the present statute does not cover rooming houses similar to that of the plaintiff in error.

The United States Supreme Court in *United States vs. Merriam*, 263 U. S. 179, 68 L. Ed. 240, held that Congress will be presumed to have intended that a *word having a judicially settled meaning* shall have that meaning when used in a statute, and also held that statutes levying taxes are not to be extended by implication beyond the clear import of the language used.

And the Court said:

“The word ‘bequest’ having the *judicially settled meaning* which we have stated, *we must presume it was used in that sense by Congress*. *Kepler v. United States*, 195 U. S. 100, 124, 49 L. ed. 114, 122, 24 Sup. Ct. Rep. 797, 1 Ann. Cas. 655; *The Abbotsford* (*The Abbotsford v. Johnson*, 98 U. S. 440, 444, 25 L. ed. 168, 169.”

“On behalf of the government it is urged that taxation is a practical matter, and concerns itself with the substance of the thing upon which the tax is imposed, rather than with legal forms or expressions. But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be

resolved against the government and in favor of the taxpayer. *Gould vs. Gould*, 245 U. S. 151, 153 62 L. ed. 211, 213, 38 Sup. Ct. Rep. 53. The rule is stated by Lord Cairns in *Partington vs. Att'y Gen.* L. R. 4 H. L. 100, 122."

"I am not at all sure that in a case of this kind—a fiscal case—form is not amply sufficient; because, as I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, *cannot bring the subject within the letter of the law*, the subject is free, however *apparently within the spirit of the law* the case might otherwise appear to be. In other words, if there be admissible in any statute what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.' And see *Eidman v. Martinex*, 184 U. S. 578, 583, 46 L. ed. 697, 701, 22 Sup. Ct. Rep. 515."

Statutes providing special taxes are to be liberally construed in favor of the taxpayer; all doubts are to be resolved against the government.

American Net & Twine Co. v. Worthington, 141 U. S. 468, 35 L. ed. 821, 12 Sup. Ct. Rep. 55; *Gould v. Gould*, 245 U. S. 151, 62 L. ed. 211, 38 Sup. Ct. Rep. 53; *United States v. Merriam*, 263 U. S. 179, 68 L. ed. 240, 29 A. L. R. 1547, 44 Sup. Ct. Rep. 69.

In *Reinecke vs. Gardner*, 277 U. S. 239, 72 L. ed. 866, the Court held that a tax imposed on corporations alone does not extend to a trustee in bankruptcy of a corporation and that the *extension of a tax by implication is not favored*.

In *Donnelley vs. U. S.*, 276 U. S. 505, 72 L. Ed. 676, the Court held that “one may not be punished for crime against the United States *unless the facts shown plainly and unmistakably constitute an offense within the meaning of an act of Congress.*”

Citing many cases.

A penal statute should be strictly construed, and with no intendment or extension beyond the import of the words used. *United States v. Gooding*, 12 Wheat 460, cited in *State vs. Smith*, 46 Iowa 673.

A penal statutes, although they are not to be construed so strictly as to defeat the legislative will, *doubtful words are not to be extended* beyond their *natural meaning* in the connection in which they are used. *Baldwin v. Franks*, 120 U. S. 678, 7 Sup. Ct. Rep. 656, 763.

In an action to recover a statutory penalty, the *defendant is not to be subjected to a penalty unless, the words of the statute plainly impose it.* *Tiffany v. National Bank of Missouri*, 18 Wall. 409.

POINT II.

The acquittal of plaintiff in error in police court is res judicata against defendant in error here and the refund is recoverable herein.

Coffey vs. United States, 116 U. S. 436; 29 L. ed. 684, held a judgment of acquittal in a criminal prosecution for a violation of the internal revenue laws, is conclusive in favor of the defendant, as claimant of the property involved in a subsequent suit *in rem*, when, as

against him, the existence of the same act or fact involved in the criminal prosecution is in issue as a cause for the forfeiture of such property, and the Court said:

“The conclusion we have reached is in consonance with the principles laid down by this court in *Gelston v. Hoyt*, 3 Wheat. 246 (16 U. S. bk. 4, L. ed. 381). * * * In this court, the question was presented whether the sentence of the district court was or was not conclusive on the defendants, on the question of forfeiture. This court held that the defendants, on the acquittal, with a denial of a certificate of reasonable cause of seizure, was conclusive evidence that no forfeiture was incurred, and that the seizure was tortious; and that these questions could not again be litigated in any forum.

“This doctrine is peculiarly applicable to a case like the present, where, in both proceedings, criminal and civil, the United States is the party on one side and this claimant the party on the other. The judgment of acquittal in the criminal proceeding ascertained that the facts which were the basis of that proceeding, and are the basis of this one, and which are made by the statute the foundation of any punishment, personal or pecuniary, did not exist. This was ascertained once for all, between the United States and the claimant, in the criminal proceeding, so that the facts cannot be again litigated between them.”

This case was followed and approved in *State vs. Intoxicating Liquor*, 75 Vt. 253; 47 Atl. 779, which held that if the parties are the same in the criminal and civil case, a judgment of acquittal on a charge of keeping liquors with unlawful intent where the unlawful intent is referable to the same date, and the court finds that he was owner of such liquors, and it was also follow-

ed and approved in the following cases: *Chantangoo v. Abaroa*, 218 U. S. 481, 482, 483, 54 L. ed. 1119, 31 Sup. Ct. 34, holding acquittal of charge of arson will bar action for civil liability; *Sierra v. United States*, 233 Fed. 39, holding where indictment charges violation of two sections, acquittal is exoneration as to both; *Grain Distillery No. 8 v. United States*, 204 Fed. 431, 122 C. C. A. 615, holding government is required to prove violation of revenue laws only by preponderance of evidence; *Chin Kee v. United States*, 196 Fed. 75, holding acquittal of charge of falsifying immigration record is bar to proceeding for deportation; *Chitwood v. United States*, 178 Fed. 443, 101 C. C. A. 342, holding acquittal of charge of rifling mail closes proceeding as far as charge of perjury is concerned; *United States v. Rosenthal*, 174 Fed. 653, 98 C. C. A. 406, applying principle in prosecution for smuggling of rings; *United States v. Lechenger*, 173 Fed. 1023, 17 C. C. A. 670, holding pleadings sufficient to warrant judgment on plea of former jeopardy; *United States v. Seattle Brewing etc. Co.*, 135 Fed. 598, 599, acquittal of transporting casks containing bottled beer falsely marked as containing soda water is bar to action for forfeiture and penalty imposed by Rev. Stats., sec. 3449; *United States v. Lot of Precious Stones*, 134 Fed. 63, 68 C. C. A. 1, where importer and wife indicted for fraudulent importation, acquittal of former is bar as to him, but *nolle prosequi* of latter is not bar to forfeiture proceedings against wife; *the Good Templar*, 97 Fed. 653, holding proceedings under Rev. Stats., sec. 4377, for forfeiture of vessel, is civil suit requiring proof to extent of preponderance of evidence; *Black v. Miller*, 158

Iowa, 302, 138 N. W. 539 holding adjudication that person was not entitled to payment for services to decedent was conclusive in suit to claim partition; State v. Cobb, 123 Iowa, 628, 99 N. W. 300, acquittal of violation of statute prohibiting illegal keeping of liquor for sale bars proceedings to condemn liquor; State v. Meek, 112 Iowa, 347, 348, 84 N. W. 6, holding acquittal before justice of peace in suit for maintenance of nuisance under Iowa Acts 17 Gen Assem., c. 188, bars suit in equity to abate same.

From these decisions it seems clear the judgment of Judge Schuldt in the police court is *res judicata* against the defendant is error in the Municipal Court and here.

Each assignment of error is relied upon in this appeal, whether especially discussed herein or not.

The authorities seem compelling that this appeal should be reversed and the tax and statute declared not to include rooming houses such as the plaintiff in error operates, and the lower court directed to enter a judgment in favor of the plaintiff in error, refunding to him the tax paid with interest and costs.

Washington, April 1, 1936.

Respectfully submitted,

RAYMOND M. HUDSON,
MINOR HUDSON,
GEOFFREY CREYKE, JR.,
Attorneys for Plaintiff in Error.

UNITED STATES
COURT OF APPEALS FOR
DISTRICT OF COLUMBIA

FILED APR 22 1936

No. 6623

In the United States Court of Appeals
for the District of Columbia

JANUARY TERM, 1936

GEORGE BLANKS, PLAINTIFF IN ERROR

v.

HAZEN ET AL, COMMISSIONER OF THE DISTRICT OF
COLUMBIA, DEFENDANTS IN ERROR

BRIEF ON BEHALF OF DEFENDANTS IN ERROR

VERNON E. WEST,

Acting Corporation Counsel, D. C.,

EDWARD W. THOMAS,

Assistant Corporation Counsel, D. C.,

Attorneys for Defendants in Error.

**In the United States Court of Appeals
for the District of Columbia**

JANUARY TERM, 1936

No. 6623

GEORGE BLANKS, PLAINTIFF IN ERROR

v.

**HAZEN ET AL., COMMISSIONERS OF THE DISTRICT OF
COLUMBIA, DEFENDANTS IN ERROR**

BRIEF ON BEHALF OF DEFENDANTS IN ERROR

STATEMENT OF FACTS

Plaintiff in error, hereinafter called plaintiff, filed suit in the Municipal Court of the District of Columbia against the defendants in error, hereinafter referred to as defendants, on March 25, 1935, seeking judgment against them in the sum of Fifteen Dollars (\$15.00) plus interest from the 19th day of April, 1933, alleging that defendants illegally, erroneously, unlawfully, and without authority at law, through duress and threats, exacted the payment of said Fifteen Dollars (\$15.00) as a license fee for the use of premises 16 Third Street SE. as an apartment house during the license year beginning November 1, 1932, and ending October

31, 1933. Defendants denied said payment was made through duress, but admitted they refused to refund the same after written request was made therefor by plaintiff on November 30, 1934, or after one year and six months had elapsed from the date of payment by plaintiff.

On the hearing of said cause the only evidence heard and presented was that of plaintiff himself.

The plaintiff testified he conducted and operated premises 16 Third Street SE. for profit and gain by renting out rooms therein (R. p. 9); that the premises consisted of three stories and basement (R. p. 8); that besides renting out a number of single rooms in the three stories, he collected rent from—

1. A man and his wife for the use of a room and kitchen on the first floor (R. p. 8).

2. A young man for the use by his mother and aunt of two adjoining rooms on the first floor with cooking facilities therein (R. p. 8).

3. A man, wife, and child for the use of two rooms on the third floor, with cooking facilities therein (R. p. 9).

that plaintiff furnished the light, water, gas, and furniture but did not supply meals to his tenants; and that there is a front and back entrance to the premises which is used by the dwellers (R. p. 9).

. Plaintiff testified further that "he paid a license tax under the Act of July 1, 1932, Code, Title 20, Section 1729, for the year from November 1, 1932,

to October 31, 1933, on the premises 16 Third Street SE., Washington, D. C., under protest and the officer told him if he did not pay it, he would be arrested" (R. p. 8). He did not state, as set out on page 3 of plaintiff's brief, that "when the officer appeared and *threatened to arrest him then and there he paid it under protest.*" This point will be fully discussed hereafter.

At the conclusion of plaintiff's testimony the lower court found in favor of defendants, and final judgment being entered thereon, we have the present appeal.

QUESTION PRESENTED

The problem of this appeal is three-fold and is concerned with

1. The voluntary or non-voluntary payment of the license fee by plaintiff (assignment of error number 3),

2. The question of whether the acquittal of plaintiff in the Police Court of the District of Columbia in 1934 on charges against him of conducting apartment houses without paying license fees therefor, at other locations than 16 Third Street SE., and for a different license year is *res judicata* of this case, and the sufficiency of the evidence by which this question is attempted to be raised by plaintiff (assignments of error numbers 1, 2, 4, and 5), and

3. The status of plaintiff's premises 16 Third Street SE., as an apartment house during the

license year 1932-1933, for which the \$15.00 fee was paid (assignments of error numbers 6 to 11, inclusive).

STATUTE INVOLVED

The statute here involved is the Act of Congress entitled "An Act to Amend section 7 of an Act entitled 'An Act making appropriations to provide for the government of the District of Columbia for the fiscal year ending June 30, 1903, and for other purposes', approved July 1, 1902, and for other purposes", approved July 1, 1932, 47 Stats. 550, D. C. Code of 1929, 1st Supp., Title 20, Secs. 1701-1759.

Paragraph 1 of this Act provides in part as follows:

SEC. 7. No person shall engage in or carry on any business, trade, profession, or calling in the District of Columbia for which a license fee or tax is imposed by the terms of this section without having first obtained a license so to do. * * *

Paragraph 5 of said Act reads as follows:

PAR. 5. All licenses issued shall date from the 1st day of November in each year and expire on the 31st day of October following, except as hereinafter provided. Licenses issued at any time after the beginning of the license years shall date from the first day of the month in which the license was issued and end on the last day of the license year above prescribed, and payment shall be

made of the proportionate amount of the annual license fee or tax: *Provided*, That where the license fee is \$5 or less the fee shall not be prorated: *And provided further*, that no fee or tax shall be prorated to an amount less than \$5.

Paragraph 29 of said Act reads as follows:

PAR. 29. Owners or managers of apartment houses shall pay a license fee of \$15 per annum: *Provided*, That where the owner or manager maintains a restaurant on said premises the license fee shall be \$18 per annum: *Provided further*, That if a restaurant is conducted on the premises by other than the owner or manager of the apartment house, the proprietor of such restaurant shall be liable for a separate restaurant license. Within the meaning of this paragraph an apartment house shall be a building in which the rooms are occupied in suites by three or more families.

Paragraph 48 of said Act reads as follows:

PAR. 48. Any person violating any of the provisions of this section, or additions thereto made from time to time by the Commissioners of the District of Columbia, where no specific penalty is fixed, or the violation of any regulation made by the commissioners under the authority of this section, shall upon conviction be fined not more than \$300 or imprisonment for not more than ninety days. Any person failing to file any information required by this sec-

tion, or by any regulation of the Commissioners of the District of Columbia made under the provisions hereof, or who in filing any such information, makes any false or misleading statement, shall upon conviction be fined not more than \$300 or imprisoned for not more than ninety days.

ARGUMENT

1. The payment of the \$15 license fee was voluntary and not compulsory

No direct assignment of error is made with respect to the matter of the finding against plaintiff of his allegation that the license tax for the year 1932-1933 was paid under duress, but plaintiff seeks to argue this question under Assignment No. 3 to the effect that "the Court erred in making a finding of fact and entering judgment for the defendant" (R. p. 13). As stated heretofore there is nothing in the bill of exceptions to the effect that a police officer threatened to arrest plaintiff and "then and there he paid it" (Plaintiff's brief, p. 3). In the first place the fee, if due at all, was payable November 1, 1932, so that six months elapsed from the due date to the actual date of payment which was April 19, 1933. In the second place the Record shows, page 8 thereof, that all any officer told plaintiff was that he might be expected to be arrested if he did not pay it. The exact wording is "the officer having told him if he did not pay it, he would be arrested." Funk and Wagnalls

Standard Dictionary states the verb intransitive "be" contemplates that something will "come to pass; take place; happen", and that the word—

"would" is used * * * to make a conditional assertion: disposed or inclined (on some implied condition) * * *

In *United States v. Grossman*, 55 F. (2) 408, 411, a conspiracy indictment attempted to allege that certain persons committed overt acts by stating that they "would" give full protection to certain other persons, "would" prevent any other person from interfering with their operations, and "would" give aid and assistance in the landing of intoxicating liquors. It was there argued that the use of the word "would" meant that full protection had been given. The Court said:

The use of the word "would" in the * * * instances cannot refer to what the defendant * * * did, but what he intended to do.

Obviously no officer could accept this fee, as all taxes and license fees are payable at the District Building, where proper notation is made and receipt given, so that plaintiff was not in fear of personal seizure. Plaintiff knew all the facts and knew of the existence of the provisions of the license law. Under such circumstances and with the demand for refund coming eighteen months after its payment, it is submitted it is clear that, regardless of the application of the apartment house li-

cense law to the premises Number 16 Third Street SE., conducted for profit and gain, plaintiff is not entitled to a refund or to have the judgment of the lower court reversed. As stated by the Supreme Court of the United States in the well considered case of *Railroad Company v. County of Dodge*, 98 U. S. 541, 25 L. Ed. 196:

“Where a party pays an illegal demand with a full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary and cannot be recovered back. And the fact that the party at the time of making the payment files a written protest does not make the payment involuntary.”

This, as we understand it, is a correct statement of the rule of the common law. * * *

The real question in this case is whether there was such an immediate and urgent necessity for the payment of the taxes in controversy as to imply that it was made upon compulsion. The treasurer had a warrant in his hands which would have authorized him to seize the goods of the Company to enforce the collection. This warrant was in the nature of an execution running against the property of the parties charged with taxes upon the lists it accompanied,

and no opportunity had been afforded the parties of obtaining a judicial decision of the question of their liability.

Same: *United States v. N. Y. & C. Steamship Co.*, 200 U. S. 494.

The officer had no warrant for the arrest of plaintiff and no written protest was ever filed with the local authorities.

See also *United States v. Edmonston*, 181 U. S. 509, where a payment by mistake of \$2.50 per acre for public lands instead of \$1.25, was held to be voluntary and not recoverable in the absence of fraud. So also in *Brunson v. Crawford County Levee District, Ark.*, 153 S. W. 828, 44 L. R. A. (N. S.) 293, it was held that the payment of a tax under demand to avoid a heavy statutory penalty is none the less voluntary in character. See also *Michel Brewing Co. v. State*, 19 S. D. 302, 103 N. W. 40, where it is stated "That by the very nature of the subject" the determination whether a payment is compulsory or not must depend upon the peculiar facts in each case.

The Police Court proceeding against plaintiff which would have resulted if he had continued to fail to pay this fee, as is the obvious statement of the officer who made the demand upon him, would have given plaintiff immediate relief if his contention is correct that premises 16 Third Street SE. was not being conducted as an apartment house for the license year 1932-1933. As shown here-

after no court has ever decided that this License Law is unconstitutional or that premises 16 Third Street SE. was not an apartment house during the above license year.

Therefore it cannot be said that the rule as laid down in the case of *District of Columbia v. Chapman*, 25 App. D. C. 95, or *Cleland v. District of Columbia*, 35 W. L. R. 278, is applicable to the instant case. In the first case the payee of the license fee had been arrested and paid the fee rather than stand trial in Police Court, and he had immediately brought suit to recover the amount paid. The court said:

We do not think that the payment made to prevent prosecution after arrest can be regarded as a voluntary one.

In the second case it was decided that—

The proper action against a municipality (to recover back money unlawfully exacted as a license tax) is assumpsit for money had and received.

This brings us to the second part of the problem.

2. **There is no existence of any similar act or fact relating to the application of the License Statute to 16 Third Street SE., that has been in issue in any court proceedings other than the instant one**

Plaintiff offered to show by his own testimony at the hearing that he had been summoned to Police Court in 1934 in connection with the use of premises 16 Third Street SE., during the subse-

quent license year 1933-1934, and that under similar conditions "the Corporation Counsel refused to issue an information against the plaintiff to be presented to the Court to punish him for not securing the said license for the said premises for the license year from November 1, 1933, to November 1, 1934." This testimony was rejected by the lower court. It could by no stretch of the imagination assume the dignity of a judicial or court decision.

Likewise plaintiff's offer of proof, without production of any Police Court records, and without any claim that he had ever been acquitted of operating an apartment house at premises 16 Third Street SE., without a license, that other charges of violation of the License Law in respect of failing to pay license fees in connection with other buildings operated by him for profit and gain had been dismissed after trial in Police Court was rejected. Such offer of testimony was as clearly inadmissible as was the first offer. These charges related to the management of premises 14 Third Street SE., and 313 East Capitol Street, and any Police Court decisions with respect to them were entirely irrelevant on the question of res judicata between the District of Columbia and the plaintiff in respect to a civil suit in which the license fee status of premises 16 Third Street SE., was the sole point in issue. Therefore the argument of plaintiff, and cases cited on the question of res

judicata, in point 2 of his brief (pp. 13 et seq.) cannot apply. Not only were these different buildings but the charges related to a different license year.

There has been no prior judgment in respect to the building, premises 16 Third Street SE. The case of *Coffey v. United States*, 116 U. S. 436, cited in plaintiff's brief (pp. 13 and 14), can have no application because premises 16 Third Street SE., has never been the subject of any prior court judgment or decision, nor would it be applicable under any circumstances because proof beyond a reasonable doubt is required in a criminal case, while proof required in a civil case is required only by a preponderance of evidence. *People v. Rohrs*, 49 Hun. 150, 1 N. Y. Supp. 672, cited in the case of *Micks v. Mason*, 145 Mich. 212; 11 L. R. A. (N. S.) 653, 658, 659 (*infra*).

Defendants especially disclaim any application of the principle intended to be laid down in *Coffey v. United States*, *supra*, and this issue, because there has never been any prior adjudication in any court of any controversy between defendants and plaintiffs here as to premises 16 Third Street SE. The *Coffey* case concludes that where the existence of any fact or act denounced has been in issue in a criminal proceeding, instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person, on the

subsequent trial of a suit *in rem* by the United States, where, as against *him*, the existence of the same fact or act is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit *in rem*.

Even under the holding in the *Coffey* case it could not be reasoned that an acquittal on a criminal charge of maintaining a liquor nuisance is a bar to a civil proceeding to abate the same nuisance under the National Prohibition Act. *Egner v. United States*, 16 F. (2) 597 (N. J.).

The rule in criminal cases illustrates the proposition that unless there has been a prior prosecution there could be no pleas of *autre fois acquit*, which

must be upon a prosecution for the same identical offense. * * * It is well settled that the jeopardy is not the same when the two indictments are so diverse as to preclude the same evidence from sustaining both.

Monroe v. United States, 56 App. D. C. 80.

It was stated in the case of *Micks v. Mason*, 145 Mich. 212, quoted herein from 11 L. R. A. (N. S.) 653, 658, 659:

* * * the case of *Riker v. Hooper*, 35 Vt. 457, 82 Am. Dec. 646, * * * was distinctly rested upon the consideration that proof required in a civil case is only proof by a preponderance of evidence, and in a criminal case proof beyond a reasonable doubt is required.

In the notes to the above case it is stated (p. 657):

In *Castrique v. Imrie*, L. R. 4 H. L. 414, Blackburn, J., says, arguendo, a judgment of conviction on an indictment for forging a bill of exchange although conclusive as to the prisoner being a convicted felon, is not only not conclusive, but is not even admissible evidence of the forgery, in an action on the bill. * * * This statement is based on the principle that a judgment is not conclusive as to anything but the point decided.

(p. 657):

Thus, acquittal on a charge of arson in burning an insured building is not conclusive upon the question of guilt, in an action brought by the accused to recover upon the policy of insurance issued to him upon the building destroyed. *Sibley v. St. Paul F. & M. Ins. Co.*, 9 Bliss. 31, Fed. Cas. No. 12830.

(p. 664):

Thus, the acquittal of a physician on the trial of an indictment found against him for producing an abortion is not a bar to an inquiry under the statute, based on the same charge, and made for the purpose of depriving him of his right to practice physic and surgery. *Re Smith*, 10 Wend. 449.

(p. 665):

(A) decision was reversed in 148 Fed. 581 (that held that a judgment of acquittal in

a criminal prosecution for the obstruction of a navigable stream * * * is a bar to a suit in equity), the court remarking, an obstruction might exist and yet the evidence adduced in a criminal trial might not be sufficient in the mind of the jury to convince them beyond doubt what the law calls a reasonable doubt, which is necessary on such trials.

(p. 668) :

And on acquittal in a prosecution instituted by the state for the offense of selling goods as a merchant without a license is not a bar to a civil action for the violation of a municipal ordinance forbidding an unlicensed person from carrying on the trade of a merchant, although both prosecutions rest on the same foundations of fact. * * * *Canton v. McDaniel*, 188 Mo. 207, 86 S. W. 1093.

(p. 668) :

So a verdict rendered in a criminal action brought by the United States against an alleged wholesale dealer in malt liquor, to recover a penalty for the nonpayment of a special tax, and which found that the defendant was not such a dealer, does not estop the United States from maintaining a civil action against the same dealer to recover the tax, since the causes of action are not identical. *United States v. Schneider*, 13 Sawy. 295, 35 Fed. 107.

Beginning at the bottom of page 14 through page 15 and down to the middle of page 16 of plaintiff's

brief verbatim quotation from Volume 13 of Rose's Notes on United States Reports, page 232, is set forth. The inapplicability of this quotation is apparent in view of the fact that no prior court decision of any kind in respect of the premises 16 Third Street SE. is here involved.

The trial tribunal rightly refused to consider itself bound by extraneous Police Court judgments.

Furthermore, it will be noted that the questions by which plaintiff sought to raise the defense of *res judicata* were all objectionable as leading, some were also objectionable as calling for other than the best evidence, and some as calling for conclusions of law. The objections were properly sustained for these, if for no other reasons.

3. Status of premises 16 Third Street SE. as an apartment house during the license year 1932-1933

There is a clear definition of when buildings used for renting purposes are apartment houses under the License Law hereinbefore set out. For the purpose of construing these laws, it is immaterial that the exterior appearance of a building may not connote an apartment house, such as the Shoreham or Wardman Park. This building at 16 Third Street SE. was clearly used by three families in suites of rooms. The word "suite" denotes a group or set of things. Certainly two or more of like things denote a suite. Plaintiff cites no authority for his assertion found on page 7 of his brief, that "two is not a suite; two is not a series;

two is not a succession.” In the case of *Elterich v. Leight Real Estate Co.* (Va.) 107 S. E. 735, 18 A. L. R. 441 it was held that a building divided into two apartments, one on the ground floor, with a common entry in front and rear, constituted an apartment house. The Court said:

“There is no generally accepted or hard and fast rule for the characterization of buildings of this character accepted everywhere by everybody”; but that generally speaking the common acceptance of the term “an apartment house” is a house where separate residences are furnished for families which would include a two family apartment house.

See also *Kenwood v. Hancock Inv. Co.*, 169 Mo. App. 715, 155 S. W. 861. The three instances of occupancy of these premises by residents in more than one room show that these groups of residents were related by blood to each other (R., pp. 8 and 9). In each instance, therefore, these three suites were occupied by families. *Neimes v. Neimes*, 119 N. E. 503; 97 Ohio St. 145.

Plaintiff places stress on his offer to show that premises 16 Third Street SE., was in fact a rooming house. The proof of this fact consisted in offering “the telephone directory in evidence to prove the same.” That such evidence was not admissible was recognized by the lower court (R. p. 9).

A rooming house is merely a house or building where there are one or more bed rooms which the

proprietor can spare for the purpose of giving lodgings to such persons as he chooses to receive, but is not a public place. That 16 Third Street SE., does not come under local statutory definition of a rooming house is obvious, because no such definition exists. This fact is recognized by plaintiff himself because in his cited case of *Cedar Rapids Investment Co. v. Commodore Hotel* found on page 7 of his brief, we find it declared to be a dangerous "even impossible task of formulating a definition of a rooming house."

CONCLUSION

It is submitted that plaintiff has not only failed to bring himself within the statute relating to erroneous license fee refunds, much less has he shown that this fee was paid under duress by him. Furthermore plaintiff was never the subject of any prior court judgment in respect to the application of the License Law to premises 16 Third Street SE., and it appears that his use of said premises comes within the definition of an apartment use contained in the License Law itself.

It is respectfully submitted that the judgment of the Municipal Court was correct and should be affirmed.

VERNON E. WEST,
Acting Corporation Counsel, D. C.,
EDWARD W. THOMAS,
Assistant Corporation Counsel, D. C.,
Attorneys for Defendants in Error.

